

INTERNATIONAL CRIMINAL LAW AND TRIBUNALS AND HUMAN RIGHTS

William Schabas OC MRIA *

In the space of a little more than twenty-four hours, during the second week of December 1948, the United Nations General Assembly adopted two fundamental legal instruments: the Convention on the Prevention and Punishment of the Crime of Genocide¹ and the Universal Declaration of Human Rights.² Both were proclaimed without a negative vote, although there were eight abstainers on 10 December when the Universal Declaration was adopted. At that time, René Cassin spoke of the Genocide Convention as a specific application of the Universal Declaration of Human Rights.³ Much later, Alain Pellet described the Genocide Convention to the International Law Commission as ‘a quintessential human rights treaty’.⁴ On the website of the United Nations Treaty Collection, the Genocide Convention appears under the rubric of ‘human rights’ where, as the first such instrument chronologically, it is at the top of the list.⁵

The two texts seem closely related, although the negotiations of each took place more or less in parallel and in relative isolation from the other. Occasionally, diplomats in the General Assembly’s Third (Human Rights) Committee, where the Universal Declaration was being hammered out, remarked on the drafting of the Genocide Convention in the Sixth (Legal) Committee.⁶ Meanwhile, those who negotiated the Genocide Convention thought that attacks upon minority groups falling short of outright physical extermination were better addressed within the framework of the Declaration, where a broad provision upon minority rights was being considered. In the end, the Third Committee dropped the minority rights text, leaving a gap in the international legal framework of the United Nations that to some extent has never been properly filled.⁷

Both Committees wrestled with the legacy of the Nuremberg trial. The negotiators of the Genocide Convention were conscious of the danger that the definition would be

* Professor of international law, Middlesex University, London; professor of international criminal law and human rights, Leiden University; *emeritus* professor of human rights law, National University of Ireland Galway.

¹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) (1951) 78 UNTS 277.

² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A(III).

³ UNCHR, Summary Record of the Three Hundred and Tenth Meeting UN Doc E/CN.4/SR.310, p. 5; UNCHR, Summary Record of the Three Hundred and Eleventh Meeting (27 May 1952) UN Doc E/CN.4/SR.311, p. 5.

⁴ International Law Commission (ILC), ‘Report of the International Law Commission on the work of its forty-ninth session’ (12 May-18 July 1997) UN Doc A/52/10, para. 76. *See also: Prosecutor v. Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999), para. 88.

⁵ United Nations Treaty Collection, *Chapter IV: Human Rights*, available at: <http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>, accessed on 25 August 2012.

⁶ UNGA Official Records of the General Assembly, Third Session (1948), pp. 102, 244, 419, 584, 854, 890, 912.

⁷ W Schabas, ‘Les droits des minorités: Une déclaration inachevée’, in *Déclaration universelle des droits de l’homme 1948-98, Avenir d’un idéal commun* (La Documentation française, 1999), pp. 223-242.

too closely linked to the crimes against humanity formulation applied at the International Military Tribunal because this might then exclude international criminal liability for atrocities perpetrated in times of peace. Those working on the Universal Declaration contended with the general principle of non-retroactivity of criminal law. Too rigid a formulation might suggest disapproval of the Nuremberg proceedings.

Not everyone welcomed the potent synergy of the Universal Declaration and the Genocide Convention. Raphael Lemkin, who had invented the term 'genocide' in 1944 and campaigned ardently for its codification, viewed the Universal Declaration as a dangerous distraction from what he considered to be the main task. Lemkin apparently also resented news coverage of the UN General Assembly referring to 'two U.N. achievements' that year.⁸ Hersch Lauterpacht dismissed the Universal Declaration as a relatively worthless exercise of no legal consequence. Lauterpacht was intensely disappointed that the General Assembly had failed to agree upon a full-blown human rights treaty that might then provide a real parallel to the corresponding Genocide Convention.⁹

Much later, Benjamin Whitaker, who was special rapporteur of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, said genocide was 'the ultimate human rights problem'.¹⁰ Each of the two instruments was seminal in its own field. The Universal Declaration of Human Rights is the foundation of all modern human rights treaties and to this day provides the core legal framework for mechanisms such as the Universal Periodic Review, undertaken by the United Nations Human Rights Council since 2008.¹¹ The Genocide Convention also influenced the drafting of future international criminal law treaties. Perhaps more importantly, its acknowledgement of the international criminal court project in article 6 ultimately resulted, a half-century later, in the successful negotiation of the Rome Statute of the International Criminal Court.

The two disciplines, human rights and international criminal law, are obviously associated in many ways besides their common ancestry, something which was certainly more than a mere coincidence. A simplistic attempt at distinguishing them might focus on the fact that international human rights law is addressed to the obligations of a State towards those subject to its jurisdiction whereas international criminal law targets individual perpetrators. Yet while human rights treaties are confined to the obligations of States, human rights law speaks to corporations and individuals as well. Article 29(1) of the Universal Declaration recalls that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible', underscoring the observation that the duty-bearers of human rights are not States alone.¹² As for

⁸ S Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, 200), p. 333.

⁹ H Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 British Ybk Intl L 354-81.

¹⁰ UNCHR (Sub-Commission) (1984) UN Doc. E/CN.4/Sub.2/1984/SR.3, para. 6.

¹¹ UNHRC, 'Institution-building of the United Nations Human Rights Council' (18 June 2007) A/HRC/RES/5/1, 5/1, Annex, I.A.1(b).

¹² See, for example, Security Council Resolution 310(1972) calling upon all States with nationals and corporations operating in Namibia to use all available means to ensure that such nationals and corporations conform, in their policies of hiring Namibian workers, to the basic provisions of the Universal Declaration of Human Rights. On the subject generally, see Andrew Clapham, *Human Rights in the Private Sphere*, Oxford: Clarendon Press, 1996.

international crimes, they are ‘committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’, as the Nuremberg judgment famously declared.¹³ Not that the State is entirely absent, because it is inconceivable that genocide could take place without its involvement.¹⁴ The Elements of Crimes of the International Criminal Court state that genocide must be committed ‘in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’,¹⁵ implying if not explicitly requiring that criminal conduct be pursuant to a plan or policy of a State. In other words, although international human rights law seems directed mainly at the State, whereas international criminal law looks to the individual perpetrator, human rights law also applies to individuals and international criminal law requires some role for the State.

Because they were both generated within the framework of the UN law-making process and couched under the normative umbrella of the Charter of the United Nations, a comfortable relationship between the Universal Declaration and the Genocide Convention may be presumed. They were adopted by the same legislator, of identical composition, within hours of each other, and with essentially the same unanimity. No similar remark can be made of another cognate, international humanitarian law, whose place within the United Nations system was actually disputed by members of the International Law Commission at its first sessions.¹⁶

Several international treaties might be described as belonging both to human rights and international criminal law. A number of major United Nations conventions that arguably belong under the rubric of international criminal law, because they impose obligations to prosecute with respect to apartheid, torture and enforced disappearances, all reference the relevant provisions of the Universal Declaration in their preambles.¹⁷ The Rome Statute of the International Criminal Court, on the other hand, rather studiously avoids too close an association with international human rights law. Its preamble cites the Charter of the United Nations but not the Universal Declaration of Human Rights.

I. IMPUNITY AND THE OBLIGATION TO PROSECUTE

In the decades that followed 1948, the human rights systems and international criminal law evolved in parallel, with some notable exceptions such as the International Convention on the Suppression and Punishment of the Crime of Apartheid adopted in

¹³ *France et al. v. Goering et al.* (1946) 22 IMT 411, p. 466.

¹⁴ *Prosecutor v. Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999), para. 94.

¹⁵ International Criminal Court, ‘Elements of Crimes,’ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

¹⁶ Yearbook of the ILC, ‘Report to the General Assembly on the Work of the First Session’ (12 April – 9 June 1949), pp. 51-53.; UN Doc. A/CN.4/13, para. 18.

¹⁷ International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, PP 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, PP 4; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc. A/61/488, PP 2.

1973. The Convention tackled the quintessential human rights challenge of the time with a package of obligations involving individual criminal responsibility and a duty upon States to prosecute offenders. The General Assembly's Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1975, combined classic human rights obligations to prevent torture with a duty to 'ensure that all acts of torture as defined in article 1 are offences under its criminal law'.¹⁸

This was not an easy link to make for many in the human rights movement who had traditionally viewed the criminal justice system with diffidence and suspicion. The focus was on violations of the right to a fair trial and on abuses of detention regimes. Success was marked by acquittals, successful appeals and release from prison. It was hardly accidental that one of the first great human rights non-governmental organizations, Amnesty International, chose to identify itself with 'amnesty', something that today seems inconceivable. Certainly the link between criminal justice and the protection of human rights had always been implicit. For example, it was trite to affirm that the right to life was protected by the criminalization of murder. But it took a number of decades for the human rights movement to see criminal law as a tool for the protection of vulnerable groups and individuals and not just as an instrument used by repressive regimes.

This development became more pronounced in the 1980s when experts in bodies like the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities began to use terms like 'impunity' and 'accountability', and to focus on justice for victims of human rights violations.¹⁹ International human rights tribunals made innovative pronouncements about the rights of victims to have crimes investigated and prosecuted.²⁰ Meanwhile, the UN International Law Commission, which was struggling to complete the Code of Crimes Against the Peace and Security of Mankind, on which it had begun work some forty years earlier, decided to abandon entirely the notion of crimes against humanity in favour of '[s]ystematic or mass violations of human rights'.²¹ These developments were also reflected in the adoption, by international human rights organizations, of international criminal justice as an important area of activity. In 1998, Amnesty International played an instrumental role in attempts to prosecute former Chilean dictator Augusto Pinochet. Human rights is a broad church, of course, and there are many who, while they accept the importance of accountability, prefer softer alternatives to criminal justice such as truth and reconciliation commissions and similar mechanisms.

The normative justification for the engagement of international human rights law with international criminal justice and its institutions appears to be largely rooted in the entitlement of victims to justice and accountability. However, international criminal law is not concerned with all victims of violent crime. Its remit, as defined by treaty and customary international law, is almost entirely confined to widespread and systematic

¹⁸ UNGA Res 3452 (XXX) (9 December 1975), art. 7.

¹⁹ 'Preliminary report submitted by Theo van Boven, Special Rapporteur, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' ("Preliminary report") (26 July 1990) UN Doc. E/CN.4/Sub.2/1990/10.

²⁰ *Velasquez Rodriguez v. Honduras*, Judgment, Inter-American Court of Human Rights Series C, No. 4 (29 July 1988).

²¹ ILC, 'Report of the International Law Commission on the work of its forty-third session' (29 April – 19 July 1991) UN Doc. A/46/10, p. 96.

violations perpetrated in association with a State or State-like entity. Sovereign States would surely resist any attempt to expand the internationalization of criminal justice so as to encompass all forms of violent crime. Yet from the standpoint of the victim of a violation of fundamental rights, can there be a reasonable distinction resulting from the context of a crime so that a woman who is raped finds an entitlement to international criminal justice only if the violence can be described as part of a larger attack amounting to crimes against humanity?

In recent years, international human rights law has taken the view that there is indeed a duty upon States to see that all serious crimes against the person are investigated and prosecuted.²² In other words, from the standpoint of international human rights law and the entitlement of victims it does not appear to make much of a difference whether the violence results from an organized State-led attack or is the result of an isolated, opportunistic social deviant. Nevertheless, the obligation upon States imposed by human rights law to investigate and prosecute serious crimes appears to be confined to acts perpetrated within their jurisdiction unless the acts are associated with the contextual elements of international crimes and are therefore subject to universal jurisdiction. This inequality of treatment is not a simple thing to explain to victims. Taken from the standpoint of international human rights law alone, it is an incoherent result. Such incoherence is perhaps the inevitable consequence of uneven evolution within the two fields, human rights and international criminal law.

Confusion creeps in because of a tendency to blur the applicable principles. For example, the argument developed within international human rights law by which amnesty for serious crimes is deemed unacceptable, relies upon the recognition of the rights of victims to justice.²³ Yet it is also said that prohibition of amnesty is confined to international crimes or so-called *jus cogens* violations. But why, if victims of human rights violations are entitled to justice, should it make any difference whether the crime meets the international definition? If amnesty is prohibited for *jus cogens* crimes, such as genocide, crimes against humanity and war crimes, why is it not also ruled out for murder and rape? This is where the complementarity and even synergy between human rights and international criminal law appears to stumble.

II. THE SUBJECT-MATTER OF INTERNATIONAL CRIMES AND THEIR RELATIONSHIP TO HUMAN RIGHTS NORMS

Many crimes fall within the ambit of international criminal law. Not all of them bear an obvious relation to the protection and promotion of human rights. A century ago, international law recognized obligations to punish and repress, and the possibility of the exercise of universal jurisdiction, to offences such as piracy, trafficking in pornography and counterfeit currency, and disrupting undersea telecommunications cables. Such crimes were designated 'international' because challenges to their repression required international cooperation and agreement on jurisdictional matters. These were not crimes about which it could be said that they 'shocked the conscience of humanity'.

With the end of the Second World War, a new generation of international crimes

²² *MC v. Bulgaria*, ECtHR, Application No. 39272/98, Judgment of 4 December 2003.

²³ *Barrios Altos v. Peru*, Judgment (Inter-American Court of Human Rights, 30 November 2001), paras. 41-44; *Marguš v. Croatia*, ECtHR, Application No. 4455/10, Judgment of 13 November 2012, para. 74.

was recognized whose common denominator was contiguous with the protection of human rights. Raphael Lemkin recognized this in the draft resolution on genocide he prepared for the UN General Assembly in October 1946:

Whereas the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern...²⁴

In the past, crimes had been internationalized in order to facilitate arrest and prosecution of international outlaws, like pirates, who were the enemies of all States: *hostis humani generis*, as Grotius called them.²⁵ The newer international crimes were being internationalized precisely because they were committed by States or with their complicity. Perpetrators went unpunished not because they could hide on the high seas but because they were protected by States and were indeed the implements of ruthless policies directed against civilian populations.

By the end of the 1940s, three broad categories of international crime were recognized: genocide, as defined in article 2 of the 1948 Genocide Convention; crimes against humanity, according to article VI(c) of the Charter of the Nuremburg Tribunal; and war crimes, set out in article VI(b) of the Charter as well as in the grave breach provisions of the 1949 Geneva Conventions. Later, with the continuous enrichment of international human rights norms, criminalization was associated with other violations that became stand-alone categories of crimes against humanity, notably *apartheid*, torture and enforced disappearance. War crimes evolved away from battlefield offences involving combatants who had broken the rules of lawful killing towards a body of law targeted at the protection of civilians, in occupied territories for international armed conflict and within the territories of the concerned State for non-international armed conflict. With confirmation that war crimes could be perpetrated in non-international armed conflict, a consequence of the judicial law-making of the International Criminal Tribunal for the former Yugoslavia²⁶ and something later confirmed in article 8 of the Rome Statute, war crimes became relatively indistinguishable from serious violations of human rights.

Some tension remains in the relationship between human rights and international criminal law with respect to the latter's subject matter.²⁷ At the Rome Conference, some delegations campaigned for the recognition of international drug trafficking, terrorism, and the crime of aggression as categories of offences that belonged within the jurisdiction

²⁴ First draft resolution on genocide, GA Res 96(I), UN Doc. A/BUR/50. The General Assembly decided to include the point in its agenda (U.N. Doc. A/181), and the matter was referred to the Sixth Committee (U.N. Doc. A/C.6/64).

²⁵ *In re Piracy Jure Gentium, Special Reference*, [1934] AC 586 (PC).

²⁶ *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).

²⁷ See, e.g., *Situation in the Democratic Republic of the Congo* (Separate and partly dissenting opinion of Judge Georgios M. Pikis) ICC-01/04 (13 July 2006), para. 32

of the International Criminal Court.²⁸ Drug trafficking clearly seems closer to the first generation of international crime to which Lemkin referred in his draft 1946 General Assembly resolution. Terrorism is in more of a grey area, with lingering controversy about its place within the protection and promotion of human rights. Like most crimes, it has its innocent victims, and they may contend that fundamental rights have been breached. However, like pirates and those who tamper with undersea cables, terrorists are generally the enemies of humanity. A system of international treaties addressed to the repression of terrorist crimes has little to do with the protection of human rights. Indeed, the ‘war on terror’ is often more a source of violations of human rights than a means to their protection.²⁹

Given a lack of consensus at the Rome Conference with respect to both terrorism and drug crimes, the matter of their inclusion in the Statute of the International Criminal Court was left to a subsequent Review Conference.³⁰ But little changed when these crimes returned to the agenda in preparation for the 2010 Kampala Review Conference, and it was decided not to address them. The central project of the Kampala Conference was the incorporation of provisions concerning the crime of aggression.

III. THE CRIME OF AGGRESSION, PEACE AND HUMAN RIGHTS

In 1941, at the dawn of the modern human rights movement, Franklin D. Roosevelt spoke of the ‘four freedoms’.³¹ His succinct formulation is repeated in the preambles of the Universal Declaration of Human Rights and the two Covenants: ‘freedom of speech and belief and freedom from fear and want’. But although freedom of speech, belief and want resonate through precise provisions of those instruments, the place of freedom from fear within human rights law has not been as clear. Roosevelt’s message was that we have a right to live in a secure, peaceful environment. Article 28 of the Universal Declaration comes closest to recognizing this: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’ When linked with the prohibition of aggressive war, there is a potent synergy between human rights and international criminal law.

Even in international criminal law, the place of the crime of aggression has not always been as secure as that of the other categories of crimes where the human rights pedigree is more clearly evident. Thus, although crimes against peace were prosecuted at Nuremberg (described by the judges as ‘the supreme international crime’),³² they were remarkably absent when the UN Security Council established the *ad hoc* tribunals for the former Yugoslavia and Rwanda. At the 1998 Rome Conference, there was insufficient consensus on the subject, not so much a result of difficulties of definition as of

²⁸ ‘Proposal Submitted by Barbados, Dominica, Jamaica, and Trinidad and Tobago on Article 5’, UN Doc. A/CONF.183/C.1/L.48; ‘Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey: proposal regarding article 5 and the draft Final Act’, UN Doc. A/CONF.183/C.1/L.71.

²⁹ E.g. see Martin Scheinin’s chapter on counter-terrorism and human rights in this volume.

³⁰ P Robinson, ‘The Missing Crimes’, in A Cassese, P Gaeta and J RWD Jones, (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002), pp. 497–525

³¹ William Schabas, ed., *The Universal Declaration of Human Rights, The travaux préparatoires*, Vol. I, Cambridge: Cambridge University Press, 2013, p. lxxiii.

³² *France et al. v. Goering et al.* (1948) 22 IMT, p. 427.

reconciling exercise of the Court's jurisdiction over aggression with an alleged monopoly on the topic attributed to the Security Council by the Charter of the United Nations. The matter was postponed until the first Review Conference, which was held in 2010. A package of amendments was adopted by consensus that should enter into force in 2017.³³

The major international human rights NGOs, generally highly devoted to the creation and work of the International Criminal Court, were surprisingly indifferent to the issue of the crime of aggression. Amnesty International said it had not:

...taken a position on the definition of the crime of aggression because its mandate – to campaign for every person to enjoy all of the human rights (civil and political and economic, social and cultural rights) enshrined in the Universal Declaration of Human Rights and other international human rights standards – does not extend to the lawfulness of the use of force.³⁴

Human Rights Watch took a more pragmatic, policy-oriented view:

Human Rights Watch's institutional mandate includes a position of strict neutrality on issues of *jus ad bellum*, because we find it the best way to focus on the conduct of war, or *jus in bello*, and thereby to promote our primary goal of encouraging all parties to a conflict to respect international humanitarian law. Consistent with this approach, we take no position on the substance of a definition of the crime of aggression.³⁵

In a footnote to its explanation, Human Rights Watch added: 'The only exceptions that Human Rights Watch has made to this policy is to call for military intervention where massive loss of human life, on the order of genocide, can be halted through no other means, as was the case in Bosnia and Rwanda in the 1990s.'³⁶

The footnote in the Human Rights Watch statement may provide a useful clue to understanding some of the reticence in this area. A militaristic tendency has crept into human rights discourse in recent years, encouraged by talk of 'humanitarian intervention' and the 'responsibility to protect'. Of course, human rights law has never been pacifistic, in the sense of a principled and intransigent opposition to the use of force under all circumstances. The preamble of the Universal Declaration says that human rights must be protected by the rule of law so that 'man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression'. But there has been a growing willingness to contemplate military interventions as the ultimate solution to serious human rights violations. In these discussions, it seems that an appeal to US military intervention (or, often, an *ex post facto* rationalization), albeit framed in reluctant language, is rarely very distant.

³³ ICC, The Crime of Aggression, RC/Res.6 (11 June 2010).

³⁴ Amnesty International, 'International Criminal Court: Concerns at the seventh session of the Assembly of States Parties' (2008) Index: IOR 40/022/2008, p. 22.

³⁵ Human Rights Watch, 'Memorandum for the Sixth Session of the International Criminal Court Assembly of States Parties' (2007), p. 13.

³⁶ *ibid.*

Another influence may be the debates about the relationship between peace and justice in the context of prosecutorial strategy at the International Criminal Court. In situations where there is an arguable case that peace negotiations may be jeopardized by prosecution, such as northern Uganda and even Darfur, there has been political pressure on the International Criminal Court from bodies like the African Union to back off in respect for the interests of promoting peace. Encouraged by human rights NGOs, the Prosecutor of the Court has taken the view that the quest for peace should not condition his decisions about selection of situations and cases. In a policy paper issued in September 2007, the Prosecutor cited paragraph 3 of the preamble to the Rome Statute ('Recognizing that such grave crimes threaten the peace, security and well-being of the world'), noting that '[t]he ICC was created on the premise that justice is an essential component of a stable peace'.³⁷ He wrote that 'there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor'. Furthermore, 'the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions'.³⁸

Yet there is also much to be said for the view that the rationale of the International Criminal Court is to promote peace, just as it was for the *ad hoc* tribunals. The latter were, after all, created by the UN Security Council in pursuit of its mandate to promote international peace and security, with Chapter VII of the Charter invoked in support. According to the first annual report of the International Criminal Tribunal for the former Yugoslavia: [I]t would be wrong to assume that the Tribunal is based on the old maxim *fiat justitia et pereat mundus* (let justice be done, even if the world were to perish). The Tribunal is, rather, based on the maxim propounded by Hegel in 1821: *fiat justitia ne pereat mundus* (let justice be done lest the world should perish). Indeed, the judicial process aims at averting the exacerbation and aggravation of conflict and tension, thereby contributing, albeit gradually, to a lasting peace.³⁹ These words suggest that the pursuit of peace lies at the heart of international justice.

The danger that the crime of aggression directs human rights and international criminal law in different directions, as it appeared to do at the Kampala Conference, which can be averted through greater attention to the underdeveloped role of peace within human rights discourse. It is certainly unfortunate that the Universal Declaration does not affirm a right to peace expressly. Perhaps that is because the drafters viewed human rights and the quest for peace as being inextricably linked, but considered peace to be a condition for the attainment of human rights rather than a right requiring precise enumeration and definition. The initial 48-article draft of the Declaration prepared by John Humphrey of the UN Secretariat began by noting that the preamble would refer to the four freedoms and was to start by stating the principle that 'that there can be no peace unless human rights and freedoms are respected'.⁴⁰

³⁷ ICC, Office of the Prosecutor, *Policy paper on the interests of justice*, available at: <http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotinterestsofjustice.pdf>, accessed 26 August 2012.

³⁸ Ibid.

³⁹ First Annual Report of the International Criminal Tribunal for the former Yugoslavia (1994) UN Doc A/49/342-S/1994/1007, annex, para. 18.

⁴⁰ Draft Outline of International Bill of Rights, Commission on Human Rights Drafting Committee (1947) UN Doc E/CN.4/AC.1/3, p. 2.

The first sentence of the preamble to the Universal Declaration reads: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...’ The immortal four freedoms of Franklin D. Roosevelt, which include ‘freedom from fear’, are cited, as Humphrey initially planned. The preamble also says that ‘it is essential to promote the development of friendly relations between nations’. Article 26 declares that education is to ‘further the activities of the United Nations for the maintenance of peace’.

There is also a structural argument. The Universal Declaration of Human Rights is an emanation of the Charter of the United Nations. Originally, the Charter was to have included a ‘bill of rights’. That would have left no doubt about the link between peace and human rights. To the disappointment of many States, delegates to the San Francisco Conference could not agree on how to incorporate a catalogue of fundamental rights in the Charter itself. They settled on general references to human rights in several provisions of the Charter, notably articles 1 and 55, as well as the preamble, leaving the work of codification to the Commission on Human Rights in accordance with article 68. That mandate was fulfilled on 10 December 1948 with the adoption of the Universal Declaration of Human Rights. To contend that the Universal Declaration is somehow neutral on the issue of aggressive war is to dissociate that document from the context of its adoption and its place within the post-war legal order, which is founded on the prohibition of recourse to force to settle international disputes.

There is much support for the concept of a ‘peoples’ right to peace’. For example, this is recognized by the African Charter of Human and Peoples’ Rights, adopted in 1981 (‘All peoples shall have the right to national and international peace and security’). In 1984 the UN General Assembly adopted a resolution entitled ‘The Peoples’ Right to Peace’. The text proclaimed that ‘the peoples of our planet have a sacred right to peace’ and that ‘the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each state’.⁴¹ There was a series of resolutions in the Commission on Human Rights⁴² and in the General Assembly⁴³ and the matter has been taken up again within the Human Rights Council.⁴⁴ The word ‘peoples’ has been dropped and it has become, simply, the ‘right to peace’ for which a UN declaration is currently being prepared.⁴⁵ There is a North-South divide on this issue, with Western States decidedly unfriendly to such initiatives, perhaps because they see this as an encroachment upon the prerogatives of the Security Council. The right to peace provides a unifying principle that assists in uniting human rights and international criminal law, as well as the other cognate, international humanitarian law. The right to peace has strong potential to assist in putting other rights into perspective.

⁴¹ Declaration on the Right of People to Peace, GA Res 39/11 (12 November 1984), annex, paras. 1-2.

⁴² Promotion of the right of peoples to peace, Commission on Human Rights Res 2002/71 (25 April 2002).

⁴³ Promotion of peace as a vital requirement for the full enjoyment of all human rights by all, GA Res 60/163 (2 March 2006).

⁴⁴ Promotion on the right of peoples to peace, HRC Res 8/9 (18 June 2008); Promotion of the right of peoples to peace, HRC Res 14/3 (23 June 2010); Promotion of the right of peoples to peace, AHRC Res 17/16 (15 July 2011).

⁴⁵ Draft Declaration on the Right to Peace, HRC Res 20/L.15, para. 1.

IV. *NULLUM CRIMEN SINE LEGE*

The most direct bridge between international human rights instruments and international criminal law relates to the issue of retroactive criminal prosecution. Article 15(2) of the International Covenant on Civil and Political Rights (there is a similar provision in the European Convention on Human Rights) provides:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The purpose was to ensure that the general prohibition of retroactive criminality did not cast any aspersions on the Nuremberg judgment and that of other post-war prosecutions.⁴⁶ It seems that some members of the Commission on Human Rights were concerned that the text of article 11(2) of the Universal Declaration of Human Rights was inadequate in this respect.⁴⁷

Retroactivity is an issue that has obsessed international criminal justice since its earliest days. At the international criminal tribunals, this has been a source of unceasing controversy. With the adoption of the Rome Statute and the development of an international criminal justice regime whose application promises to be universal, the issue of retroactive punishment ought to be largely laid to rest. The principle of *nullum crimen* is set out in article 23 of the Rome Statute, but this hardly seems necessary because the International Criminal Court can only exercise jurisdiction over crimes defined in its own texts on a prospective basis, that is, for crimes perpetrated after the Statute has entered into force. Indeed, in the initial cases before the Court, the issue has hardly arisen, in contrast with the experience at all of the earlier international criminal tribunals.

But arguments about retroactive prosecution persist at both the judicial and political levels. The development of international criminal law is accompanied by constant attempts to reassess the past. Although human longevity makes prosecution for many offences that occurred years ago increasingly unlikely, because the perpetrators continue to die off or become unfit to stand trial, many difficulties remain. In 2008 Spanish prosecutor Baltazar Garzón launched an investigation into the crime against humanity of enforced disappearance committed in the years immediately following the Spanish Civil War, raising questions as to whether international law applicable in the early 1940s recognized that crimes against humanity could be committed in peacetime. The same point has arisen recently with respect to trials concerning post-Second World War atrocities in the Baltic States, and the acts of the Khmer Rouge in Cambodia during

⁴⁶ *Kononov v. Latvia*, ECtHR, Application No. 36376/04, Judgment of 24 July 2008, para. 115(b), citing *X. v. Belgium*, Application No. 268/57 [1960] *Yearbook* 241; *Touvier v. France*, Application No. 29420/95 (1997) 88 DR 148; *Papon v. France (no. 2)* (dec.), Application No. 54210/00, ECHR 2001-XII (extracts).

⁴⁷ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge: Cambridge University Press, 2009, pp. 178-188; David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, The Hague/Boston/London: Martinus Nijhoff, 2001, pp. 78-83.

the 1970s. An important decision of the Grand Chamber of the European Court of Human Rights, *Kononov v. Latvia* of 17 May 2010, ruled favourably upon the legality of a trial held in the 1990s of a pro-Soviet partisan for the summary execution of Nazi sympathizers at the height of the Second World War.⁴⁸

There is a lingering unease about retroactivity at the Nuremberg and Tokyo trials. According to the judgment of the International Military Tribunal, ‘it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice’.⁴⁹ The French version of the judgment is more qualified: ‘[n]ullum crimen sine lege ne limite pas la souveraineté des États; elle ne formule qu’une règle généralement suivie’. The judgment continues:

To assert that it is unjust to punish those who have in defiance of treaties and assurances attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished . . . [The Nazi leaders] must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.⁵⁰

In other words, the Tribunal admitted that there was a whiff of retroactivity to prosecution for crimes against peace, but said leaving such wrongs unpunished would be unjust. The *nullum crimen* rule was thus a relative one, subject to exception in light of circumstances. With respect to war crimes, the Tribunal was able to point to some precedent supporting international prohibition of certain behaviour, including the Hague Convention of 1907.

In place of the rather flexible approach at Nuremberg, and perhaps somewhat in reaction to it, international human rights law proposes a seemingly intransigent prohibition of retroactive prosecution unless it can be shown that the crime existed under national or international law. The norm is deemed to be non-derogable and, for this reason, it has sometimes been classified among the *noyau dur* of human rights. Yet in practice, human rights tribunals have often manifested the same malleable approach to *nullum crimen* that was adopted by the International Military Tribunal and that was endorsed by the likes of Hans Kelsen, B.V.A. Röling, and Hersch Lauterpacht. They have tended to reject the militant positivism proposed by the Nuremberg defendants.

For example, the European Court of Human Rights has held that uncoded crimes may be prosecuted providing they are sufficiently foreseeable and accessible. This is not really all that different from the remarks of the war crimes tribunal, cited above: ‘the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind’. It is an approach that might seem to lean to a natural law approach, in its fealty to morality as a basis for human conduct.

⁴⁸ *Kononov v. Latvia*, ECtHR, Application No 36376/04 [GC], Judgment of 17 May 2010; Also see: *Korbely v. Hungary*, ECtHR, Application No. 9174/02 [GC], Judgment of 19 September 2008; *Kolk and Kislyiy v. Estonia*, ECtHR, Application No. 23052/04, Decision of 17 January 2006.

⁴⁹ *France et al. v. Goering et al.* (1948) 22 IMT, p. 462.

⁵⁰ *Ibid.*

Cases from the United Kingdom dealing not with international crimes but with the ordinary crime of ‘spousal rape’ provide important authority here.⁵¹ This concept had not traditionally been part of the common law, which defined the crime of rape as an act perpetrated by a man against a woman other than his wife. In the 1980s common law judges in England started to find defendants guilty of raping their wives. The convicted men petitioned the European Court of Human Rights, arguing that the law had been changed without them being properly informed. The Court dismissed the applications, saying the criminal prohibition of rape, even with respect to a spouse, was both foreseeable and accessible. The Court was persuaded in its opinion by the fact that the crime in question was offensive to ‘human dignity and human freedom’.⁵² In other words, it might well have applied the non-retroactivity rule in a stricter fashion had the case concerned a more technical or administrative offence that did not engage core values.

The liberal approach to *nullum crimen* taken by the European Court of Human Rights appears to have influenced judges at the ad hoc international criminal tribunals. In one of the more detailed treatments of this issue, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia was asked to declare that the concept of superior responsibility as a mode of liability amounted to retroactive law. The Trial Chamber turned to the case law of the European Court of Human Rights, noting that article 7 of the Convention ‘allows for the “gradual clarification” of the rules of criminal liability through judicial interpretation’.⁵³ It said that it was ‘not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided’,⁵⁴ citing in support several rulings of the European Court, including one of the spousal rape decisions, which it quoted *in extenso*. Subsequently, the Appeals Chamber of the Special Court for Sierra Leone relied upon this passage in its discussion of *nullum crimen* in the child soldiers case.⁵⁵

A year after the *Hadžihasanović* jurisdictional motion, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia invoked the words of the International Military Tribunal to the effect that *nullum crimen* was ‘first and foremost a “principle of justice”’. Also citing the spousal rape cases of the European Court, the Appeals Chamber said:

This fundamental principle [*nullum crimen*] ‘does not prevent a court from interpreting and clarifying the elements of a particular crime’. Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be

⁵¹ *CR v United Kingdom*, ECtHR, Ser. A, No. 335-B, para. 41; *SW v United Kingdom*, ECtHR, Ser. A, No. 335-B, Judgment of 22 November 1995, para. 36.

⁵² *CR v United Kingdom*, ECtHR, Ser. A, No. 335-B, para. 42.

⁵³ *Prosecutor v. Hadžihasanović et al.* (Decision on Joint Challenge to Jurisdiction) IT-01-47-PT (12 November 2002), para. 58.

⁵⁴ *Ibid.*

⁵⁵ *Prosecutor v. Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (child recruitment) SCSL-04-14-AR72(E) (31 May 2004), para. 25.

sufficiently accessible at the relevant time, taking into account the specificity of international law when making that assessment.⁵⁶

The Appeals Chamber referred again to the European Court's position that the concepts of 'foreseeability' and 'accessibility' of a norm will greatly depend on 'the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed'. On the specificity of international criminal law, the Appeals Chamber returned to Nuremberg, and the the *Alstötter* case, explaining the difficulties of applying the *ex post facto* rule to such prosecutions.⁵⁷

V. RIGHTS OF VICTIMS AND REPARATIONS

One of the most concrete manifestations of the influence of human rights discourse on international criminal law is in the area of reparations for victims. As early as 1989, the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities prepared a report on the 'restitution, compensation and rehabilitation for victims of gross violations of human rights'.⁵⁸ The language was taken up in article 75(1) of the Rome Statute, which is entitled 'Reparations for victims':

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

The Rome Statute envisages that orders of reparation be made against convicted persons. When the Statute was adopted, there was a widely held view that the Court would prosecute warlords and tyrants who had stashed unimaginable sums of money in Swiss bank accounts. But experience as the *ad hoc* tribunals has shown that virtually all defendants are sufficiently indigent as to qualify for legal aid. The Trial Chamber hearing the first case at the International Criminal Court considered that it was 'inappropriate to impose a fine in addition to the prison term, given the financial situation of Mr Lubanga. Despite extensive enquiries by the Court, no relevant funds have been identified.'⁵⁹

Alternatively, reparations may be paid out of the Trust Fund for Victims, established pursuant to article 79 of the Rome Statute. Located within the Part of the Statute dealing with penalties, it was conceived of in the Statute as a repository for 'money and other property collected through fines or forfeiture'. To date, it has received a small income in the form of voluntary contributions from States parties and a few

⁵⁶ *Prosecutor v. Milutinović et al.* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - *Joint Criminal Enterprise*) ,IT-99-37-AR72 (21 May 2003), para. 38 (references omitted).

⁵⁷ *Prosecutor v. Milutinović et al.* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - *Joint Criminal Enterprise*) ,IT-99-37-AR72 (21 May 2003), para. 39.

⁵⁸ Preliminary report (n 18).

⁵⁹ *Prosecutor v. Lubanga* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06 (10 July 2012), para. 106.

individuals. The operating costs of the Fund are charged to the general budget of the Court. This makes it less easy to see that if the operating costs were subtracted from its income, the Fund would be bankrupt. There will probably be much acclaim when the Court makes its first orders of reparation to victims drawn from the Trust Fund. It is doubtful, however, if this is really the best (and most cost-effective) way to address the issue of reparation and compensation for victims. An important part of assessing the relationship between human rights and criminal law is appreciating the limits of both sectors.

VI. CONCLUDING COMMENTS

This short essay has not endeavoured to present a comprehensive overview of the relationship between international criminal law and human rights. Rather, it has proposed a discussion of some of the nodal points, where the two disciplines intersect and interact, not always without a degree of friction. Perhaps the most obvious relationship of all, which is the application of fair trial norms drawn from human rights law to the work of the international criminal tribunals, has been eschewed. In one sense this is a huge topic, and its omission might be deemed an unpardonable gap in any discussion. In reality, the procedural fairness discussion sheds little light on the relationship between human rights and international criminal law. The principles and norms are broadly similar to those applicable to national justice systems, with slight distinctions. There are shocking violations of fair trial standards accepted at the domestic level in the cases before the international criminal tribunals. Probably the most notorious problem is the right to trial without unreasonable delay. The first trial at the International Criminal Court took more than six years from arrest to sentence.⁶⁰ At the International Criminal Tribunal for Rwanda, two accused men spent twelve years in detention before and during their trial before eventually being acquitted. The hearing concluded in December 2008 but the judgment was not issued until September 2011. The two innocent men remained in detention for thirty-two months while the judges drafted a verdict declaring them to be not guilty. In the final judgment, they dismissed arguments that fundamental rights had been violated, holding ‘that a delay of 12 years from arrest to judgment does not, *per se*, constitute undue delay for the purposes of the Statute’.⁶¹

International criminal law and human rights both emerged from the crucible of the Second World War. Profound changes were underway in the world order as the hitherto impenetrable wall of sovereignty began to give way to certain fundamental human values. The two strands came together in December 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. Several decades of parallel and uneven development were to follow. The revival of international criminal justice in the 1990s was very much a consequence of progress within the human rights movement, by that time increasingly attentive to issues of victims, accountability and impunity.

A final observation of a more personal nature: There is an extraordinary cross-fertilization of individual professionals who move back and forth across the divide

⁶⁰ *ibid.*

⁶¹ *Prosecutor v. Bizimungu et al.* (Judgment and Sentence) ICTR-99-50-T (30 September 2011), para. 74.

between human rights and international criminal law. Many of the greatest judges at the international tribunals were distinguished veterans of human rights institutions, including Antonio Cassese, Theodor Meron, Fausto Pocar and Stefan Trechsel. Moving in the other direction, the last two UN High Commissioners for Human Rights came to the position from distinguished careers in international criminal justice: Louise Arbour had been Prosecutor at the *ad hoc* tribunals for the former Yugoslavia and Navi Pillay had been a judge at the International Criminal Court and the Rwanda Tribunal, where she served as President for a term. Perhaps nothing better illustrates the close bonds between these two fields.